

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

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BEAZER HOME HOLDING CORP,

Plaintiff,

v.

CW CAPITAL FUND ONE, LLC, *et al.*,

Defendants.

2:09-cv-02089-RCJ-LRL

**O R D E R**

Before the court is plaintiff Beazer Homes Holdings Corp.'s Motion to Compel New South Federal Savings Bank to Respond to Beazer's First and Second Interrogatories and First Requests for Production of Documents (#57). No response to the motion has been filed.

On February 26, 2010, Beazer served its First Interrogatories and First Request for Production on defendant, New South Federal Savings Bank ("NSFSB"). Beazer served its Second Interrogatories on May 6, 2010. The parties agreed to exchange responses to written discovery on May 11, 2010. On May 11, 2010, then counsel for NSFSB, Christopher Thorsen, served intervenor plaintiff LLP Mortgage Ltd.'s responses to Beazer's interrogatories, requests for production, and requests for admissions, but he did not provide the responses of NSFSB. On May 18, 2010, Andrew Detherage, counsel for Beazer, emailed Thorsen to inquire about NSFSB's responses. *See* Exh. E to Mot. (#57). On May 20, 2010, Detherage and co-counsel, Monica Brownwell Smith, talked to Thorsen about the lack of response from NSFSB. Thorsen said he was working through issues related to NSFSB, but would get back to Beazer's counsel regarding the discovery.

Two weeks passed without word from Thorsen. Brownwell Smith sent an email requesting responses on June 2, 2010. She alerted Thorsen that she would file a motion to compel by the end of

1 the week unless she received some kind of commitment from Thorsen to respond to the discovery. *See*  
2 Exh. F to Mot. (#57). Thorsen replied that he was out of the office until June 7, 2010, and the parties  
3 agreed that he could have until June 8, 2010 to get back to Beazer's counsel before they filed a motion  
4 to compel. *See id.* at Exh. G. In a telephone call on the evening of June 8, 2010, Thorsen told  
5 Detherage that due to a conflict, new counsel would be appearing for NSFSB and that Thorsen could  
6 not take a position with regard to the outstanding discovery. On June 9, 2010, however, Thorsen did  
7 serve NSFSB's responses to Beazer's First and Second Interrogatories and First Request for Production.  
8 Each response was an objection that NSFSB is not the real party in interest because the FDIC took over  
9 for it as the receiver.<sup>1</sup> Beazer filed the instant Motion to Compel (#57) the next day, June 10, 2010.  
10 Beazer argues that NSFSB's objection is untimely, and thus waived.

11 On June 23, 2010, NSFSB filed a Substitution of Attorney (#62), which the court approved on  
12 June 28, 2010. Order (#67). On June 28, 2010, the court also issued an Order (#69) granting the  
13 substitution of FDIC, as receiver for NSFSB, as a defendant in place of NSFSB. As described in the  
14 order, NSFSB was closed on December 18, 2009, and the FDIC was appointed as its receiver. The  
15 FDIC accepted the appointment the same day. *See* Order (#69) at 2. Accordingly, the FDIC became  
16 the proper defendant against whom plaintiff's claims must be asserted, and against whom discovery  
17 requests pursuant to Rules 33 and 34 must be made. *See id.* (citing 12 U.S.C. §§ 1821(d)(2)(A)(i) and  
18 1821(d)(2)(B)(i); § 1821(d)(3)). NSFSB is no longer a party to this action.

19 Accordingly,

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24 <sup>1</sup> The text of the objections is as follows:

25 Objection. The FDIC took control of NSFSB's assets as receiver for [NSFSB] as of December 18,  
26 2009. Accordingly NSFSB is no longer the real party in interest in this matter and cannot respond  
substantively to this [Interrogatory/Request for Production]. NSFSB hereby reserves any  
substantive objections it may have to this [Interrogatory/Request for Production].

1 IT IS ORDERED that plaintiff's Motion to Compel New South Federal Savings Bank to  
2 Respond to Beazer's First and Second Interrogatories and First Requests for Production of Documents  
3 (#57) is DENIED.

4 DATED this 13th day of September, 2010.

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7 **LAWRENCE R. LEAVITT**  
8 **UNITED STATES MAGISTRATE JUDGE**  
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